

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
W.R. GRACE & CO., <i>et al.</i> ,	.	Case No. 01-01139 (JKF)
	.	Jointly Administered
Debtors.	.	
	.	Jan. 30, 2006 (2:07 p.m.)
	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1           THE COURT: Good afternoon. Please be seated. This  
2   is the matter of W.R. Grace, 01-1139. The participants  
3   listed by phone are David Siegel, Paul Norris, Daniel  
4   Speights, Debra Felder, Jonathan Brownstein, Mark Shelnitz,  
5   Tiffany Cobb, Peter Pearson, Craig Moran, Edward Westbrook,  
6   Alan Madian, Brian Kasprzak, Leslie Epley, Stephen Vogel,  
7   Darrell Scott, David Parsons, Matthew Kramer, David Bernick,  
8   Saul Bianca, Brenda Diluigi, Barbara Seniawski, Marti Murray,  
9   Elizabeth DeCristofaro, Andrew Craig, Michael Davis, if I  
10   didn't already call him, Michael Insalco, John Phillips, Sara  
11   Gooch, Christina Kang, Sandy Esserman, March Colelman, and  
12   Daniel Glosband. Ms. Baer, good afternoon.

13           MS. BAER: Good afternoon, Your Honor. Jane Baer on  
14   behalf of the debtors. Your Honor, we have only one  
15   contested matter left on the agenda today. What I'd like to  
16   do for everybody's benefit is to run through everything else  
17   routinely first and then that will bring us down to the one  
18   contested matter, which is the matter involving the cross-  
19   motions for summary judgment, Peter Pearson. Your Honor,  
20   item 1 on the agenda is the motion of BDM Construction  
21   Company for an order granting a modification of the automatic  
22   stay. We have been in contact with BDM. We believe we have  
23   resolved this matter by agreeing to a lifting of the stay in  
24   the event that there is insurance coverage, and the insurance  
25   carrier will defend. BDM is going to waive any rights they

1 may have to a deductible if there is one. It's unclear right  
2 now whether the insurance company will defend and whether or  
3 not there is a deductible, and we are going to work through  
4 that with the insurance carrier. So, we're asking this be  
5 put over to next month in the hopes that if we come to an  
6 agreement, we'll just submit it on a certificate of counsel.

7 THE COURT: All right, that's fine.

8 MS. BAER: Your Honor, agenda item number 2 is the  
9 debtors' fifth omnibus objections to claims. There are two  
10 claims left other than the Peter Pearson claim. One of them  
11 involves Michelle and David Archer. The other one involves  
12 the Weatherford Company. There are a number of claims all  
13 with the same claimant. We're continuing the Archer matter  
14 to February 21<sup>st</sup>. That will actually have to be dealt with  
15 somewhat like the Peter Pearson matter with a motion for  
16 summary judgment. They are also pro se and so the  
17 alternative dispute resolution procedures probably will not  
18 apply. With respect to the Weatherford matter, that's being  
19 handled by Delaware counsel, and they are talking about  
20 settlement of that claim, so, I'd like to submit an order  
21 continuing those two matters to the next hearing.

22 THE COURT: Okay, the next hearing with respect to  
23 Archer, you expect just to do a scheduling order?

24 MS. BAER: Yes, Your Honor. And we are excepting  
25 out the Peter Pearson matter. That will be subject to a

1 separate order after we have the arguments and the Court  
2 determines what to do there.

3 THE COURT: All right. Okay, that's signed.

4 MS. BAER: We'll skip item number 3 right now.  
5 That's the Peter Pearson matter as is item number 4. That  
6 takes us to item number 5, which is the pretrial on the  
7 debtors' motion for an injunction, vis-a-vis, the State of  
8 New Jersey, and also item number 6, which is the debtors'  
9 related motion with respect to the adversary proceeding and  
10 the automatic stay. Your Honor, the State of New Jersey has  
11 asked that we continue those matters to the February 21<sup>st</sup>  
12 hearing. The parties are discussing settlement, but because  
13 of the change in administration in New Jersey, the New Jersey  
14 government needs a little bit more time. I have an order I'd  
15 like to submit on continuing this matter to February 21 and,  
16 most importantly, continuing the stay until the conclusion of  
17 the February hearing. New Jersey has seen this order and is  
18 in agreement with its form.

19 THE COURT: All right. Thank you. Okay, that order  
20 is entered.

21 MS. BAER: Thank you, Your Honor. That takes care  
22 of agenda items 5 and 6. Agenda item number 7, the motion of  
23 BNSF for clarification of the case management order, you  
24 already signed an order on that one.

25 THE COURT: Just a second. I'm sorry. I'm sorry,

1 what item were you addressing next that you said I signed an  
2 order on?

3 MS. BAER: Item number 7, the motion of BNSF.

4 THE COURT: All right, all right, thank you.

5 MS. BAER: That takes us to item number 8. Item  
6 number 8 is with respect to the Anderson Memorial class  
7 action. That was continued to February 21<sup>st</sup>.

8 THE COURT: Okay.

9 MS. BAER: Item number 9 is also related to Anderson  
10 Memorial, also continued to February 21<sup>st</sup>.

11 THE COURT: All right.

12 MS. BAER: Item number 10 was the debtors' motion to  
13 strike or compel full disclosure by the Property Damage  
14 Committee related to Fact I witnesses. The parties have  
15 conferred on that matter. We're asking that the motion be  
16 continued to the February 21 hearing. The Property Damage  
17 Committee has indicated they're going to provide some  
18 supplemental information and hopefully that will resolve the  
19 matter, but for control purposes we'd like to continue it to  
20 February 21.

21 THE COURT: Mr. Baena?

22 MR. BAENA: That is correct, Your Honor.

23 THE COURT: Okay, thank you.

24 MS. BAER: Your Honor, that concludes the items on  
25 the agenda, but we have one cleanup matter, and that is as an

1 outcome of the hearings with Mr. Speights and his related  
2 claims last week. The parties entered into a stipulation  
3 resolving certain claims and allowing a withdrawal. I have  
4 the signed stipulation signed by both parties and the order  
5 disallowing those claims I'd like to present for entry.

6 THE COURT: All right. Thank you. Okay.

7 MS. BAER: Your Honor, that takes us back to items  
8 number 3 and 4, and this relates to an unsecured claim. I  
9 believe that at this point the other parties in the  
10 courtroom, especially the Property Damage Committee and the  
11 Personal Injury Committee lawyers would like to be excused  
12 from the rest of the hearing.

13 THE COURT: That's fine. Have a safe trip back.

14 ALL: Thank you, Your Honor.

15 THE COURT: Go ahead.

16 MS. BAER: Your Honor, item number 3 and item number  
17 4 relate to a claim filed by Peter Pearson, a pro se  
18 claimant, Claimant No. 2281. Your Honor, the debtors  
19 objected to this claim in the fifth omnibus objection. This  
20 claim is a claim for \$741,600. It's a non-asbestos personal  
21 injury claim. In the proof of claim, Mr. Pearson alleges  
22 that the debtor failed to provide certain safety equipment,  
23 information, and training regarding Grace's roofing membrane  
24 product or GRMs. He attached to the proof of claim a  
25 statement and an affidavit. He indicates in the statement

1 that he worked as a supervisor for Grace out of its Arizona  
2 office in the Warranty Division doing warranty work on the  
3 Grace roofing membrane product. Grace apparently provided a  
4 ten-year warranty and had its own staff to do the warranty  
5 work. He alleges that while working for Grace he handled  
6 toxic chemicals, and Grace did not provide him adequate  
7 instruction or information. He alleges damages and in his  
8 claim and backup documentation suggests that he had severe  
9 head pain and rashes while working for Grace. He demands  
10 \$400 per day for each day he worked for Grace. Your Honor,  
11 there are a number of papers that were filed in the objection  
12 process before the motions for summary judgment were filed,  
13 and I apologize, I note on the agenda that they were not  
14 listed, therefore, not attached, but I do have a copy of all  
15 of those papers here in court and can submit them to you.  
16 But I'll briefly summarize what all those papers did then  
17 leading up to the motions for summary judgment. Your Honor,  
18 first Mr. Pearson responded to the debtors' objection to his  
19 claim. In there he provided a little bit more detail with  
20 respect to his injury indicating that he had acute joint pain  
21 in his hands, diminished vision, and had a couple of skin  
22 lesions removed that he indicates were caused by him spilling  
23 toxic chemicals while working for Grace. He alleges that  
24 Grace motivated solely by its quest for profits and malice  
25 harmed him by exposing him to these chemicals. He said that

1 he did not discover this until 2002 when doing his own  
2 research to try to explain why he was having certain health  
3 issues. The only evidence Mr. Pearson attached to his proof  
4 of claim-related documents was a letter from a Grace customer  
5 dated in 1991 that was actually provided to Mr. Pearson in  
6 1995 that indicates that the customer's complaining that some  
7 chemicals that they believed were toxic were washed down the  
8 sidewalk and into a drain. He actually in the letter is  
9 thanking Grace for doing the warranty work but asking them to  
10 be a little more neat and clean in doing the work. Later on,  
11 Your Honor, Mr. Pearson supplemented his response and in the  
12 supplement attached some material safety data sheets that he  
13 obtained, again, from Grace. The material safety data sheets  
14 are not actually for the product that he was working on.  
15 They're provided by Grace with a cover indicating that these  
16 are similar to the materials he was working on, but the  
17 materials he was working on were actually discontinued in  
18 1986. In the documentation Mr. Pearson supplies an affidavit  
19 indicating he never saw this information prior to the time he  
20 just got it from Grace, and he claims that the chemicals  
21 involved that he was exposed to were very severe and toxic.  
22 Grace replied to those objection papers and response to  
23 objection papers indicating that Mr. Pearson had not provided  
24 any evidence of an injury. He had simply provided his own  
25 affidavit saying he did in fact have injury. Mr. Pearson



1 never filed a lawsuit against Grace. Mr. Pearson never filed  
2 a Workman's Compensation claim against Grace. In Grace's  
3 response, Grace also alleged that Mr. Pearson's claims were  
4 barred by the Arizona Worker's Compensation Statute, that  
5 that statute provides that when a worker has a claim against  
6 his employer, his exclusive remedy is under the Worker's  
7 Compensation Statute. The only option would be if the worker  
8 opted out. Mr. Pearson did not opt out and did not make a  
9 Worker's Comp. claim. In addition to, Your Honor, Grace also  
10 responded in those papers that in the event that the Worker's  
11 Compensation Statute did not apply, there's a two-year  
12 personal injury statute in Arizona, and there's a discovery  
13 rule when the plaintiff knew or should have known in the  
14 exercise of reasonable diligence of his cause of action.  
15 Here, Your Honor, the claimant indicates he didn't know until  
16 2002 of these injuries, but on the other hand, Your Honor, he  
17 actually incurred injuries as he alleged in his other papers  
18 more than ten years ago, alleges that certain doctors told  
19 him in 1991 he had these issues, and then attaches a document  
20 he received in 1995 related to these alleged toxic chemicals.  
21 Mr. Pearson also makes a Fourteenth Amendment claim arguing  
22 that Grace violated his due process by not giving him  
23 adequate knowledge, instructions, and the like with respect  
24 to handling the chemicals. Your Honor, Grace responded by  
25 indicating that he must demonstrate there's a state action

1 here, and that there is no state action. Grace is a private  
2 company, and the fact that Grace may have to comply with  
3 certain rules and regulations does not make it a state  
4 action, and therefore, a Fourteenth Amendment claim could not  
5 be sustained. Mr. Pearson in his reply on the objection  
6 papers then alleged one new cause of action, and that is a  
7 violation of EPCRKA, the Emergency Planning Community Right-  
8 to-Know Act. He alleged that Grace violated the statute  
9 which was passed to protect the public from chemical  
10 emergencies and chemical dangers. That lead us up to the  
11 point, Your Honor, where Mr. Pearson filed a motion for  
12 summary judgment indicating that Grace should be liable for  
13 his claim. In his motion for summary judgment, he alleges as  
14 uncontested facts that Grace has not established its  
15 compliance with EPCRKA. That he has suffered severe injury.  
16 He acknowledges in his motion for summary judgment that there  
17 may be an issue of fact on the statute of limitations, and he  
18 then argues that Grace did in fact violate EPCRKA, that the  
19 statute of limitation was tolled because of the theory of  
20 adverse domination, and that the Worker's Compensation Act  
21 was not applicable because Grace had engaged in wilful  
22 misconduct. Your Honor, in response to Mr. Pearson's motion  
23 for summary judgment, we also filed a cross-motion for  
24 summary judgment. It's clear, Your Honor, from what has been  
25 provided by Mr. Pearson that summary judgment cannot be

1 granted in his favor. He has in fact raised several  
2 questions of fact. First of all, there's an issue as to  
3 whether or not there was any hazard existing at the  
4 workplace. Second, there's an issue as to whether even if  
5 there was a hazard, any harm was caused by this hazard to Mr.  
6 Pearson. Mr. Pearson has provided no medical evidence of any  
7 injury or a causal connection. As a result of discovery, he  
8 did provide one medical report that he obtained after we made  
9 a discovery request on him last year. In that medical  
10 report, a doctor outlined Mr. Pearson's complaints with  
11 respect to his eyesight, with respect to joint pain,  
12 indicated that they observed some red eyes, dry eye, and  
13 joint pain and suggested to Mr. Pearson that he see a  
14 specialist to see whether or not there is any causal  
15 connection between the complaints he had in any of his  
16 workplace situations. There's nothing further with respect  
17 to medical evidence. In addition, Your Honor, Mr. Pearson  
18 has clearly raised issues with respect to whether Grace  
19 violated any of the EPCRA rules or had any OSHA violations.  
20 Your Honor, if need be, Grace can provide evidence that there  
21 was regular training regarding use of these products, that  
22 the materials provided employees - the materials were  
23 provided to the employees along with information with respect  
24 to what they were. Grace can provide evidence that the  
25 claimant did not make any complaints against the company, did

1 not file any reports, did not file any lawsuits, and did not  
2 file a Worker's Compensation claim. And in addition, Your  
3 Honor, Grace can prove that there were no OSHA violations and  
4 no EPCRKA violations. Under those circumstances, Your Honor,  
5 the motion for summary judgment filed by Mr. Pearson must be  
6 denied. There are substantial issues of material fact. On  
7 the other hand, Your Honor, you never need to get to them.  
8 As Grace has outlined in its cross-motion for summary  
9 judgment, Mr. Pearson cannot state a cause of action under  
10 the many theories that he has come up with along the line  
11 here as this claim has evolved. First of all, Your Honor,  
12 EPCRKA. There is no standing by an individual to assert a  
13 claim against EPCRKA, and no entitlement to private damages.  
14 In order to bring an EPCRKA violation a citizen may in fact  
15 bring it to the attention of a governmental entity. He needs  
16 to give 60 days' notice to the governmental entity, the EPA,  
17 or the state environmental agency, and then they investigate.  
18 There's no private right to damages. To the extent that a  
19 violation would be found, the penalties would be paid to the  
20 United States or the state. Mr. Pearson did not provide the  
21 appropriate 60-day notice. No investigation was done, and  
22 again, even if there was one or even if there was a  
23 violation, it would not provide Mr. Pearson any personal  
24 rights nor would it provide him any individual damages.  
25 Second, Your Honor, Mr. Pearson has no independent cause of

1 action under OSHA. Although OSHA is a statute that protects  
2 workers in the workplace, there is no individual right of a  
3 worker to bring a suit for violations of OSHA. It is not a  
4 private cause of action. That again is something that only a  
5 governmental entity can investigate, and ultimately if  
6 violations are found, they must be corrected and penalties  
7 paid to the government, not to individuals. Thirdly, Your  
8 Honor, with respect to Worker's Compensation. Arizona law  
9 governs here, Your Honor. Mr. Pearson was employed by the  
10 company in Arizona. Under Arizona law, the suit is barred by  
11 the exclusive remedy provision which indicates that a worker,  
12 if he wants to bring a claim against an employer, must bring  
13 it in the Worker's Compensation system unless he opts out.  
14 Mr. Pearson here did not opt out. He also did not file a  
15 Worker's Compensation claim. Mr. Pearson alleges that there  
16 is an exception to this exclusive remedy for wilful  
17 misconduct. However, Mr. Pearson will not be able to  
18 establish anything that would get him to wilful misconduct.  
19 It is a very restrictive provision under the law. A claimant  
20 must establish a deliberate intention to harm an individual,  
21 not just gross negligence. No evidence could be shown here,  
22 Your Honor, of Grace knowing and purposely acting to cause  
23 the injury involved, and that is what would have to be  
24 established in order to get around the Worker's Compensation  
25 exclusive remedy provision. But, Your Honor, even if

1 Worker's Compensation's exclusive remedy provision did not  
2 apply, we still have the statute of limitations. The statute  
3 of limitations for personal injury claims in Arizona is two  
4 years. There is a discovery rule, when he knew or should  
5 have known of the injury. Here, Your Honor, Mr. Pearson  
6 worked for Grace from mid-1986 to early 1992. The injuries  
7 he complained of, the headaches, the rashes took place while  
8 he was working for Grace. He indicates that while he was  
9 working for Grace, he did question the materials he was using  
10 and how to handle them. He also said that he saw a doctor in  
11 1991 about his complaints. He also got a letter in 1995  
12 which indicates in there that some of these materials may  
13 have been toxic. All of the evidence that he has provided,  
14 Your Honor, suggests that he knew of these injuries many,  
15 many years ago and did not bring a cause of action within the  
16 applicable statute of limitations. Now, Mr. Pearson also  
17 alleges that there's a way to get around the statute of  
18 limitations, and that is the doctrine of adverse domination.  
19 However, Your Honor, that too is inapplicable in this  
20 situation. The doctrine of adverse domination is there for a  
21 corporation to bring a cause of action against its officers  
22 and employees who were in positions of control, where the  
23 statute is tolled because they did not know of the wrongful  
24 acts until these officers and employees were either left the  
25 job or the corporation got information another way. Last but

1 not least, Your Honor, Mr. Pearson alleges the Fourteenth  
2 Amendment violations by Grace's behavior, and once again,  
3 that cannot be sustained. He cannot bring a cause of action  
4 under the Fourteenth Amendment. That is a state action. If  
5 the state has violated his due process rights, purely private  
6 conduct does not apply, and even if Grace had to comply with  
7 federal and state rules and regulations, that does not  
8 establish under the law a close enough nexus in order to  
9 bring a Fourteen Amendment violation. Your Honor, finally,  
10 Mr. Pearson argues that the bar date notice established in  
11 this bankruptcy case somehow revives his right to bring this  
12 cause of action. Once again, Your Honor, this is incorrect,  
13 and the cause of action cannot be sustained. It's very clear  
14 under the law that in order for a claim to be enforceable in  
15 the first place, it has to be applicable in the first place  
16 under state law. The statute of limitations has already run.  
17 The bar date does not revive it. Under these circumstances,  
18 Your Honor, Grace requests that Mr. Pearson's motion for  
19 summary judgment be denied, as he has stated numerous issues  
20 of contested fact, and then in addition, Your Honor, Grace's  
21 motion for summary judgment be granted as Mr. Pearson has not  
22 established an appropriate cause of action under the law.  
23 Thank you.

24 THE COURT: Is somebody representing Mr. Pearson?

25 MR. PEARSON (TELEPHONIC): Hello, Your Honor.

1 THE COURT: Hello.

2 MR. PEARSON (TELEPHONIC): Can you hear me okay?

3 THE COURT: Yes, I can. Will you state your name,  
4 please.

5 MR. PEARSON (TELEPHONIC): My name is Peter P.  
6 Pearson.

7 THE COURT: Go ahead, sir.

8 MR. PEARSON (TELEPHONIC): Well, credit to the  
9 attorney for doing quite a bit of homework. It's unfortunate  
10 though that it's not exactly - it's poignantly detailed as I  
11 would like to have seen. I'd like to start off with one of  
12 the exhibits that she does move on, and that's the letter  
13 from Thompson Max Center or to the W.R. Grace corporation, my  
14 supervisor, Ken Porter. And in this, they point out that had  
15 the University of Las Vegas Hazardous Material Department  
16 been aware of the hazardous material, they would have shut  
17 down the jobs. And the problem that I'm faced with, Your  
18 Honor, is that I was exposed to these toxic materials at a  
19 time that it takes - it's almost like a gestation period for  
20 these injuries to manifest. In fact they can take a day or  
21 two to manifest. One thing that counsel pointed out or  
22 actually left out was the fact that I did give in answering  
23 to their interrogatory medical reference to a Dr. Mike  
24 Johannes (phonetical) that I seen, and he stated that, you  
25 know, the problems that I was experiencing at the time in '89



1 was because of the chemicals that I was exposed to, but I had  
2 at the time no knowledge that there was any possibility of  
3 getting any kind of a recourse against the company because I  
4 didn't know the seriousness of it. And this is where the  
5 negligence comes in and this is where the deliberate intent  
6 of W.R. Grace. She points out one affidavit from a Tim Berry  
7 and paragraph (6) is the only supporting affidavit that Grace  
8 has been able to put forth. In paragraph (6) - mind you,  
9 Tim Berry was an employee that worked for me and then he also  
10 was a crew member or crew chief at the same time. The  
11 affidavit is accurate but it withholds some serious  
12 information. In the one paragraph with the one sentence it  
13 points out, Employees were provided with MSDS for all Grace  
14 products and other products, and, in the sentence above it,  
15 Products including instructions on the safe use and  
16 application of Grace products. That's true. We were  
17 provided with information on how to properly apply the GRM  
18 product materials. We were not provided safety equipment,  
19 and that's clearly . . . (microphone not recording) in Tim  
20 Berry's affidavit. We were not given respirators. We were  
21 not given rubber gloves. We were not given the information  
22 that caused my skin cancer, that caused me to have  
23 debilitating eye injuries. The joints in my hands are  
24 enlarged greatly because of the xylene and the . . . that I  
25 was exposed to. Now, the counsel would have you think that

1 somehow they are relieved from any liability on this, but  
2 this happened in multi-state jurisdictions, not just Arizona.  
3 I worked in California. I worked in Nevada. I worked in New  
4 Mexico and Texas, and so, we haven't even touched on the laws  
5 if we want to apply those to those different states. But she  
6 argues also that there's no Fourteenth Amendment cause of  
7 action here. Well, yet at the same time, she wants to put  
8 everything under the Arizona law or Workman's Compensation.  
9 I worked for an international corporation. W.R. Grace is an  
10 international corporation, and I was working out of the  
11 Arizona office, and so, the deliberate attempt of W.R. Grace  
12 comes in the fact that they not only knew the law, they knew  
13 the rights and those standards from the congressional act.  
14 They chose not to do it for the intent of keeping the  
15 financial profits under the umbrella of the GRM area. The  
16 Grace roofing membrane in the Arizona area was a failed  
17 product, and they continued to try to fix the product by  
18 having new updates with it. They would come out with a new  
19 cleaner. They would come out with a new something for the  
20 laps, you know, using some of the roofing terminology. But  
21 it continued to fail because of the Arizona sun. Well, in  
22 order to keep it - the money within - in order to avert the  
23 expenditures, they tried to keep it in-house. They put a  
24 ten-year warranty on these products but the product was  
25 failing. Well, when they tried to downsize the company and

1 keep it in-house, the safety protections that a large company  
2 would have, let's say a private roofing company, was gone.  
3 Those safety protections were not there. So, even if they  
4 did give out, and I say, if they gave out MSDS forms, they  
5 were just a piece of paper that they would give out. There  
6 was no training. There was no safety equipment. There was  
7 no rubber - There was nothing to protect us from these  
8 hazards, and the fact that they take a gestation period to  
9 manifest, illustrates the fact that there is some time that  
10 has to go by before quite often these things come up in a  
11 permanent state, as in my case. And so, wilful misconduct,  
12 under the exclusive remedy provision in Arizona law is  
13 applicable, and I do meet the standard on that because W.R.  
14 Grace had the obligation to tell me under the right to know,  
15 at the time that I was using some of the most hazardous  
16 materials in the industry. I was a roofer, but I was a  
17 laborer working with let's say tar and stuff like this. I  
18 wasn't familiar with what xylene is. I wasn't familiar with  
19 cerulean (phonetical), and I'm looking right now at the MSDS  
20 form that I downloaded for this case, and it's MSDS No.  
21 -85707, Emergency Overview: May be harmful if absorbed  
22 through the skin. Causes parachugenic effect. Causes local  
23 skin tumors. That information was never told to me or Tim  
24 Berry at the time, and we were not given the safety equipment  
25 to protect ourselves. And these chemicals have different

1 effects on different people. They may effect you differently  
2 than they would effect me because this is not just pure  
3 xylene. We're talking a chemical soup, if you will, of  
4 paints and paint thinners and different chemicals in order to  
5 try to achieve what W.R. Grace was trying to achieve, and  
6 that was a cheap roofing product for commercial buildings in  
7 a single-ply manner. It failed. And so they were doing  
8 everything they could in order to (a) save money, which was  
9 the primary objective and the second objective was to get it  
10 done as quick as possible, keeping it in-house. So, I've  
11 given the Court and I've given counsel the adequate  
12 information. Yet, what she has done is she's painted a  
13 picture that's not exactly accurate because even in the  
14 affidavit that Tim Berry provided, it's accurate but it's  
15 also very empty in the fact that it does not - it only  
16 supports what I'm trying to say, there was no safety  
17 equipment provided. And had we gone further, we had a  
18 gentleman that - his name was Randy - We had to take him to  
19 the Emergency Room for intoxication of irine fumes, at the  
20 Thompson Max Center. And these were just accidents, these  
21 were events that were happening that affected us all and  
22 whether they affected us within that time frame of a two-year  
23 period, it is questionable because these things take time.  
24 These things take time to gestate and to manifest. But, I  
25 leave it in the Court's hands that, you know, I've given the

1 Court the information needed, and if there's anything more  
2 the Court needs, I'd be more than willing to provide it.

3 THE COURT: Well, I don't see a basis at this point  
4 for a claim. You have to - Number one, in most of the states  
5 that you've discussed, there is exclusive Worker's  
6 Compensation remedies to start with, but you would  
7 undoubtedly be bound by Arizona's in any event, since you're  
8 employed out of the Arizona office. So, your remedy against  
9 - for this kind of violation, to the extent that you were  
10 working was a Worker's Compensation suit to start with. To  
11 the extent that you can get beyond the Worker's Compensation  
12 claim for some form of wilful misconduct and you had  
13 headaches and manifested skin injuries and so forth prior to  
14 the time that you left Grace's employ, then you're on an  
15 inquiry notice to - obligation that is, to look into what the  
16 cause may be. You say you have a doctor's report now that's  
17 a recent report that says what the cause of your injuries may  
18 have been back in 1989. I don't know how a doctor could give  
19 you something that says what your injuries were in 1989 if  
20 it's not a treating doctor and you don't have those injuries  
21 now.

22 MR. PEARSON (TELEPHONIC): Well, in answering  
23 interrogatory number 19, it was in 1989 that I seen Johannes  
24 and came to Arizona. And then in - let me see what - what I  
25 over here at the University of Arizona, I went and seen

1 another doctor there to look basically as a followup because  
2 although I don't have the ability to - How do I put this? In  
3 1989 when I was exposed to this, I was under the impression  
4 at the time that there was nothing wrong. I was told by my  
5 supervisors that the chemicals that I was using were safe.  
6 There's nothing wrong with them. Your hands will get red.  
7 Your hands are blistered, but that's okay. It's just part of  
8 the working condition. And that's when I seen Johannes on  
9 that. And, but what was not told to me was the long-term  
10 effect. Workman's Compensation would have been good, had I  
11 broke my arm, had I fallen off a ladder at that time, or  
12 something within that two-year time frame, but we're talking  
13 about something that manifests over a long period of time,  
14 outside of the work standard, outside of the window of  
15 employment shall we say. We're talking about something that  
16 when this alters and the one thing that I look at on here is  
17 the para-genetic term, term genetic effect, that means it  
18 alters to some degree my makeup on a genetic level.

19 THE COURT: Well, you have to prove that. You have  
20 to have a doctor's test that shows that in fact that's the  
21 case. You can't just allege it, you know, a lot of things  
22 may have an effect but they may not have an effect as well.  
23 Those warnings are posted to alert people to the fact that  
24 there can be some danger, but you yourself have to have an  
25 injury and you have to prove what that injury is worth, is

1     valued at. To the extent that there is a Worker's  
2     Compensation claim, Worker's Compensation isn't limited to  
3     the fact that you fall off a ladder or break your arm, it's  
4     for all Worker's Compensation claims and to the extent that  
5     it's a permanent injury then there's a different remedy that  
6     applies at a certain point in time through Social Security  
7     Disability or whatever, other mechanisms arise. So, I don't  
8     see at this point how you have a viable claim, Mr. Pearson.

9             MR. PEARSON (TELEPHONIC): The viable nature of the  
10    claim comes from the fact that - and W.R. Grace is in support  
11    of this in their affidavits that they provided. They did not  
12    provide the safety equipment that was needed at the time.

13            THE COURT: But whether they did or not, that you  
14    surely would have known about back at the time that you were  
15    working for Grace, if you had no safety equipment. So,  
16    definitely on that score, if you have some private right of  
17    action, which you don't under these circumstances under the  
18    Fourteenth Amendment or under the other two statutes, OSHA or  
19    the rest that were cited, if you had a private cause of  
20    action it would have arisen at the time that there was no  
21    safety equipment, not twenty years later.

22            MR. PEARSON (TELEPHONIC): Oh, the idea - and to  
23    some degree, Your Honor, that's accurate but with the  
24    exception though that I was told, Tim was told, the other  
25    employees were told that these chemicals were safe, and

1 that's where the wilful misconduct comes from, because not  
2 only did Ken Porter, which was my supervisor, and Dan Cubalt,  
3 they both went forth and said, Don't worry about it. These  
4 things are okay. These chemicals are safe. And we began to  
5 suspect - I mean, I suspected at the time when I had to take  
6 a guy to the hospital, but we were rushed, we were pushed. I  
7 was threatened on my job that if I continued to ask questions  
8 at the time, and I asked questions at the time, Is this stuff  
9 safe? Yes, I was told, repeatedly. Don't worry about it.  
10 Well, it wasn't until I got the letter from the Thompson Max  
11 Center that this stuff was not safe.

12 THE COURT: But that was in 1995; correct?

13 MR. PEARSON (TELEPHONIC): That's when the letter  
14 was - actually I had to write the Thompson Max Center on  
15 that, and they gave me that letter. I did not know about  
16 that letter until the outset of this case, which I think was  
17 '99 when I filed the initial claim. I didn't know about  
18 that. That was sent to Ken Porter. And so, that means, not  
19 only Ken knew that, you know, these were hazardous, had the  
20 HAZMAT in Nevada been aware, they would have shut down the  
21 job, but the people that needed to know the most were the  
22 employees. The employees were not told that this was  
23 hazardous stuff.

24 THE COURT: Well -

25 MR. PEARSON (TELEPHONIC): And this is the only



1 element that I can bring a cause of action is in the  
2 bankruptcy setting.

3 THE COURT: Well, I think it's too late for you to  
4 bring that cause of action in the bankruptcy setting. I  
5 think the issue was a Worker's Compensation claim because you  
6 were injured on the job and you were alleging long-term  
7 effects of that injury on the job. I don't see at this point  
8 that there is a viable cause of action based on information  
9 that's dated back to 1995.

10 MR. PEARSON (TELEPHONIC): Okay. I guess that's it;  
11 huh?

12 THE COURT: I'm afraid that is. I just don't see  
13 that you have a compensable injury against this estate at  
14 this time.

15 MR. PEARSON (TELEPHONIC): Okay.

16 THE COURT: All right. I will enter an order that  
17 strikes the claim or sustains the objection and grants the  
18 motion - the debtor's motion for summary judgment and denies  
19 Mr. Pearson's motion. To the extent that Mr. Pearson is  
20 alleging facts that are not of evidence and there were a  
21 number of them in this recitation and in the pleadings,  
22 obviously those were material facts that the debtor disputes,  
23 and it would not be ripe for summary judgment but the  
24 debtor's motion is ripe for summary judgment, and as a matter  
25 of law, I find that Mr. Pearson cannot state a claim for

1 relief, so I will grant the debtor's motion for summary  
2 judgment.

3 MS. BAER: Thank you, Your Honor. I'll prepare an  
4 order reciting it.

5 THE COURT: All right.

6 MR. PEARSON (TELEPHONIC): Thanks, Your Honor.

7 THE COURT: Thank you.

8 MS. BAER: That concludes the agenda for today, Your  
9 Honor.

10 THE COURT: Okay. Any housekeeping matters?

11 MS. BAER: No.

12 THE COURT: Okay. We're adjourned, thank you.

13 MS. BAER: Thank you.

14 (Whereupon at 2:44 p.m. the hearing in this matter  
15 was concluded for this date.)  
16  
17  
18

19 I, Elaine M. Ryan, approved transcriber for the  
20 United States Courts, certify that the foregoing is a correct  
21 transcript from the electronic sound recording of the  
22 proceedings in the above-entitled matter.  
23

24 /s/ Elaine M. Ryan  
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February 6, 2006